FILE COPY

In the Supreme Court
OF THE
United States

Office - Supreme Court, U. S.
FILED
OCT 31 1949
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1949

ARROW STEVEDORING COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 441

ARROW STEVEDORING COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 442

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the
Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

LYMAN HENRY,
351 California Street, San Francisco 4, California,
Attorney for Petitioner.

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street, San Francisco 4, California,
Of Counsel.

Subject Index

Page

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

Summary statement of material involved 2

(a) The pleadings 2

(b) The evidence 5

(c) The District Court's decree in the Williams case .. 7

(d) The District Court's decree in the Mitchell case.... 8

(e) Proceedings on appeal of both cases to the United States Court of Appeals 9

Questions presented 10

The basis of the court's jurisdiction 10

Reasons relied on for allowance of the writ 12

Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 25

Opinions of the court below 25

Specification of errors 26

Basis of the court's jurisdiction 28

Statement of the case 29

Argument 29

I.

The government's right to recoupment must be based solely upon the District Court's findings and decree (in favor of the longshoremen) which became final, no appeal having been taken 29

II.

A vessel owner cannot be saddled with liability for injury to an employee of an independent contractor where the sole proximate cause of the injury was the negligence of the independent contractor 32

Page

III.

The stevedoring contract relieves Arrow of liability to the government whether Arrow's negligence and the vessel's unseaworthiness were both proximate causes of the accident, or whether Arrow's negligence was the sole proximate cause of the accident 45

IV.

Even assuming that negligence and improper use of the vessel's appliance constitutes "unseaworthiness" of the vessel, the stevedoring contract relieves Arrow of liability for the accident 49

V.

Whether or not the stevedoring contract merely expresses the existing maritime law, as argued by the government, Arrow's liability under the Longshoremen's Act is exclusive and precludes the government's right to contribution 51

Conclusion 59

Table of Authorities Cited

Cases	Pages
Aden Maru case, 51 F. (2d) 599	40
American Stevedores Inc. v. Porello et al., 330 U.S. 446, 91 L. Ed. 1011	17, 20, 52, 55
Andrea F. Luckenbach (9 Cir.), 1935 A.M.C. 1182, 78 F. (2d) 827	29
Calanchini v. Bliss (9 Cir.), 1937 A.M.C. 203, 88 F. (2d) 82	29
Crowley Launch and Tugboat Co. v. Wilmington Transportation Co. (9 Cir.), 1941 A.M.C. 449, 117 F. (2d) 651	29
Desiano v. United States of America, 1946 A.M.C. 544	35
Gonzales v. SS Belos, 1939 A.M.C. 324	39
Leo E. Johnsen v. U.S.A., 79 Fed. Sup. 448	17, 51
Lillig v. Union Sulphur Co. (9 Cir.), 1937 A.M.C. 59, 87 F. (2d) 277	29
Lortie v. American Hawaiian Steamship Co. (9 Cir.), 1935 A.M.C. 1178, 78 F. (2d) 819	29
Luckenbach Steamship Co. v. Campbell (9 Cir.), 1925 A.M.C. 1551, 8 F. (2d) 223	29
Matson Navigation Co. v. Hansen (9 Cir.), 1943 A.M.C. 86, 132 F. (2d) 487	29
Menefee v. Chamberlin (C. A. 9), 1949 A.M.C. 1388	30
Ove Tysko v. Royal Mail Steam Packet Co., 81 Fed. (2d) 960	36
Panama Mail Steamship Co. v. Vargas (9 Cir.), 1929 A.M.C. 1345, 33 F. (2d) 894	29
Porello v. U. S. A., et al., 153 Fed. (2d) 605	18, 19, 20
Portel v. United States of America and Zalud Marine Corporation, 1949 A.M.C. 487	43
Seaboard Stevedoring Corp. v. Sagadahoc SS Co. (9 Cir.), 32 Fed. (2d) 886	33, 42
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099	33, 36
Seas Shipping Co. v. Ward (C.C.A. 9) 22 F. (2d) 251	37

Pages

Shelton et al. v. Seas Shipping Company, 75 Fed. Supp. 195, 1947 A.M.C. 1528 35
Stockton Sand and Crushed Rock Co. v. Bundesen (9 Cir.), 1945 A.M.C. 659, 148 F. (2d) 159 29

The Bergen (9 Cir.), 1933 A.M.C. 877, 64 F. (2d) 877..... 29
The Boston Maru (9 Cir.), 1927 A.M.C. 1282, 20 F. (2d) 508 29
The Golden Star (9 Cir.), 1936 A.M.C. 692, 82 F. (2d) 687 29
The Heranger (9 Cir.), 1939 A.M.C. 369, 101 F. (2d) 953.. 29
The Hermosa (9 Cir.), 1932 A.M.C. 541, 57 F. (2d) 20..... 29
The Kongosan Maru (C.C.A. 9), 292 F. 801..... 37
The Mabel (9 Cir.), 1932 A.M.C. 1618, 61 F. (2d) 537..... 29
The Osceola, 189 U. S. 159, 23 S. Ct. 487, 47 L. Ed. 760.... 36
The Shangho (9 Cir.), 1937 A.M.C. 425, 88 F. (2d) 42.... 29

United States v. Arrow Stevedoring Company, 175 Fed. (2d) 329 5

Wandtke v. Anderson (9 Cir.), 1935 A.M.C. 130, 74 F. (2d) 381 29
Wood v. Security Mut. L. Ins. Co., 112 Neb. 66, 198 N. W. 573, 34 A.L.R. 712 57

Statutes

28 U.S.C. 2101 (c) 10
33 U.S.C.A. 901-950 .....10, 27, 48, 51
33 U.S.C.A. 905 .....18, 51, 52, 55, 56, 57
46 U.S.C.A. 742 ..... 5, 10
46 U.S.C.A. 781 ..... 2, 10

Miscellaneous

Admiralty Rule 56 .....3, 21, 30
15 Am. Jur. 387 .....21, 56

Black's Law Dictionary 57

Congressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, p. 5411 .....22, 57

Robinson on Admiralty, page 305 35

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

ARROW STEVEDORING COMPANY, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No.
ARROW STEVEDORING COMPANY, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petition of Arrow Stevedoring Company, a corporation, for a writ of certiorari to be directed to the

United States Court of Appeals for the Ninth Circuit to review judgments of that Court entered in the above entitled causes on the 21st day of June, 1949, and its orders denying rehearing on the 8th day of August, 1949, in favor of respondent and against petitioner, respectfully shows:

SUMMARY STATEMENT OF MATERIAL INVOLVED.

This petition concerns two separate cases arising out of the same accident involving two longshoremen employed by your petitioner aboard the Navy vessel USS Edgecombe, owned and operated by the United States, while afloat in navigable waters of the United States in San Francisco Bay, State of California. One of the longshoremen, Percy L. Williams, was injured, and the other, John Henry Mitchell, was killed as the result of being struck by a steel hatch cover which, due to a defective locking device, fell from its upright position while the men were standing in the hold of the vessel preparing to unload cargo. The two cases were tried separately but were consolidated by stipulation for purposes of appeal to the Court of Appeals. Likewise it was stipulated in the trial of the *Mitchell* case that the evidence taken in the earlier trial of the *Williams* case could be considered by the Court.

(a) The pleadings.

The libel in the Williams case was filed *in personam* in admiralty pursuant to the Public Vessels Act, 46 USCA 781, which permits the bringing of such action "against the United States, * * * for damages caused by a public vessel of the United States," alleging that

while employed as a longshoreman by petitioner, Arrow Stevedoring Company (hereinafter called "Arrow") aboard the USS Edgecombe, a Navy vessel owned and operated by the respondent United States of America (hereinafter called "the Government"), libelant suffered injuries which were proximately caused by the negligence and carelessness of the Government and by reason of a defective and unseaworthy hatch door of said vessel. (Wms. R. 2-11.)[1] The Government filed its answer denying negligence on its part and further denying that the accident was proximately caused by any unseaworthy or defective condition of said hatch cover and alleging that said appliance was suitable, proper and seaworthy (Wms. R. 12-14) and further alleging that said accident resulted solely from libelant's own negligence and that of his employer Arrow. (Wms. R. 16.)

The Government also filed a petition under Admiralty Rule 56, to bring in Arrow as a third party, alleging that the stevedoring operations being performed at the time of the accident were pursuant to a stevedoring contract (Respondent Government's Exhibit B, Wms. R. 265 to 269, and Appendix Part I) entered into by and between the Government and Arrow and further alleging that by the terms of said contract Arrow agreed to "indemnify and save harmless the United States against all loss or damage in connection therewith" (Wms. R. 19); and that if the Government was under any liability "such liability

[1]References to the Transcript of Record in the Williams case will be designated "Wms. R."

was solely and proximately caused by the negligence" of Arrow by reason whereof any and all such liability should be borne by Arrow and that Arrow should be "proceeded against by libelant directly and in the place and stead" of the Government. (Wms. R. 20-21.) Arrow thereafter duly filed its answer to said petition and to the libel admitting the existence of said stevedoring contract but denying that under the terms thereof Arrow was required to "indemnify and save harmless the United States against all loss or damage" and further denying that said accident was proximately caused by its carelessness, recklessness or negligence. Arrow also denied that any liability on the part of the Government to libelant was caused or should be borne by Arrow, either wholly or partially. (Wms. R. 30-35.)

Arrow's answer further alleged that it had provided hospital and medical benefits in the amount of $614.74[2] pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA 901 to 950, and that pursuant to said act had paid to said libelant Williams compensation in the sum of $1175.00. A lien claim was prayed for on behalf of Arrow in the total sum of $1789.74 against any recovery that might be made by said Percy L. Williams. (Wms. R. 35.)

The pleadings in the Mitchell case were substantially similar excepting that suit was instituted by the personal representative and administrator of the estate of

[2]Further proof showed that medical benefits were furnished by Arrow in addition to those alleged in its answer, accordingly the judgment was for $680.49 for this item.

the deceased and was brought not only under the Public Vessels Act, but also under the Suits in Admiralty Act, 46 USCA 742, the pertinent portions of which provide as follows: "In cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *."

(b) The evidence.

A statement of the evidence will be limited to that selected by the United States Court of Appeals[3] in its opinions in the *Williams* case, *United States v. Arrow Stevedoring Company,* 175 Fed. (2d) 329, and in the *Mitchell* case,[4] *United States v. Arrow Stevedoring Company,* 175 Fed. (2d) 333, (printed in the record, Wms. R. 317 to 326; Mchl. R. 115-120.)

The accident causing Mitchell's death and Williams' injury resulted from the falling of the No. 3 port hatch cover, which cover was a steel door 14' long fore and aft and 8' wide athwartship and weighing about 3500 pounds. While in an open position it swung inboard being hinged at the bottom along the center fore and aft line of the vessel, and the starboard

---

[3]We do not agree with the most unusual departure by the Court of Appeals from its own oft expressed rule against hearing cases *de novo,* but since it has chosen in this instance to do so, we shall base one phase of our argument upon the facts as found by the Court of Appeal.

[4]References to the Transcript of Record in the Mitchell case will be designated "Mchl. R."

hatch door of similar dimensions also swung inboard when opened. Each door was supposed to be secured by dogs or hooks held by pins at the top. Both dogs, fore and aft which were meant to hold the port hatch door were defective and one of the locking pins was absent while the other one was bent so that it would not securely hold the door open. Both the starboard and port doors were opened by Arrow's employees during the night shift preceding the accident. The defect in the dogs was then discovered and work was discontinued at that hatch. The walking boss or supervisor of the night gang of Arrow's employees either did nor did not call the attention of the condition of the port hatch door to the attention of the walking boss or supervisor of Arrow's day gang of stevedores who came aboard the vessel at 7:00 A.M. the following morning after the night gang had completed its shift. Williams and Mitchell were in the lower port hatch ready to commence work when the port hatch door suddenly fell striking them and causing Mitchell's death and Williams' injuries. The port hatch door could have been secured even in the presence of the defective dog had the stevedores used a turnbuckle and gear, which equipment was on the ship. Immediately after the accident the door was so secured. No officer of the vessel was at the No. 4 hatch when the work was being done by the stevedores on the night shift or at the time of the accident the following morning and none of the ship's officers knew that the No. 4 hatch door had been insecurely opened.

The stevedoring contract was introduced into evidence by the Government as Respondents' Exhibit B (Wms. R. 265 and Appendix Part I), the pertinent provisions of which are as follows:

> (b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:
>
> * * * * * * *
>
> (2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * nor shall the contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

(c) The District Court's decree in the Williams case.

At the conclusion of the evidence, the Court found in favor of libelant and Arrow and against the Government, and thereafter on August 30, 1946, Findings of Fact and Conclusions of Law and Final Decree were signed and filed in the District Court (Wms. R. 36-49), the said Final Decree reading as follows (Wms. R. 59-60):

> "Ordered, Adjudged and Decreed, that the libelant, Percy L. Williams, recover of and from the respondent United States of America the sum of $9259.50, together with libelant's costs taxed in the sum of $33.00, and amounting in all to the sum

of $9292.50, with interest on said total sum at rate of 4 per centum per annum from the date of this decree until paid; and it is further

Ordered, Adjudged and Decreed, that the respondent Arrow Stevedoring Company is not liable to libelant; and it is further

Ordered, Adjudged and Decreed, that the respondent Arrow Stevedoring Company is not liable to the United States of America and that the petition of the respondent United States of America, under Rule 56 of the General Admiralty Rules, be and the same is hereby dismissed on the merits; and it is further

Ordered, Adjudged and Decreed, that the respondent Arrow Stevedoring Company do have and it is hereby given a lien on the sum herein awarded to libelant for weekly indemnity payments paid to libelant under the Longshoremen's and Harbor Workers' Compensation Act, the amount of which is $1175.00, and for the reasonable value of medical care furnished to said libelant, the amount of which is $680.49, which lien is hereby fixed at the total sum of $1855.49."

(d) The District Court's decree in the Mitchell case.

At the conclusion of the evidence, the Court found in favor of libelant and Arrow and against the Government, and thereafter on August 19, 1947 signed and filed Findings of Fact and Conclusions of Law and its Decree, the said Final Decree (Mchl. R. 35-36) reading as follows:

"Ordered, Adjudged and Decreed, that the libelant Edgar E. Reite, recover of and from the respondent United States of America the sum of

$18,000.00 together with libelant's costs taxed in the sum of $....., and amounting in all to the sum of $..... with interest on said total sum at the rate of 4 per centum per annum from the date of this decree until paid; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to libelant; and it is further

Ordered, Adjudged and Decreed, that the impleaded respondent Arrow Stevedoring Company is not liable to the United States of America, and that the petition of the respondent United States of America, under Rule 56 of the General Admiralty Rules, be and the same is hereby dismissed on the merits."

(e) Proceedings on appeal of both cases to the United States Court of Appeals.

The Government prosecuted appeals only as to Arrow having accepted the decrees in favor of libelants.

The two cases were consolidated for purpose of appeal and argument to the United States Court of Appeals and after the filing of briefs and argument, the Court of Appeals on June 21, 1949 rendered its opinion decreeing that the District Court's order in both cases be reversed and in favor of the Government for the entire amount of its liability to each of the libelants. (Wms. R. 317-328; Mchl. R. 115-121.)

Thereafter on July 20, 1949 Arrow duly filed its petition for rehearing which was denied on August 8, 1949. (Mchl. R. 121-122; Wms. R. 328.)

THE BASIS OF THE COURT'S JURISDICTION.

The jurisdiction of this Court is based upon Title 28 U.S. Code 2101 (c).

The Federal Statutes construed by the Court below, which construction is claimed to be in error in this petition, are the Suits in Amiralty Act, 46 USCA 742, and the Public Vessels Act, 46 USCA 781, and the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA 901-950.

The decrees of the Court of Appeals were rendered on June 21, 1949 (Wms. R. 327; Mchl. R. 120) and the orders denying rehearing in each case were made and filed on August 8, 1949 (Wms. R. 328; Mchl. R. 121).

QUESTIONS PRESENTED.

(1) Can a defect of the vessel be held, in a *final* decree, to be the *sole proximate cause* of the accident as to libelants, and as to libelants' employer Arrow, on exactly the same facts, be held to have no causal connection?

(2) Did the Court of Appeals err in holding a vessel "unseaworthy" as to stevedores because of a condition created solely by said stevedores' own negligence?

(3) Can a vessel owner, who was held by the Court of Appeals to have been free of negligence and whose vessel's defect was held to have had no causal relation to the accident, be saddled with liability to an employee of an independent contractor whose negligence

was held to be the sole proximate and intervening cause of the accident and resulting injuries?

(4) In view of the finding by the Court of Appeals that the vessel's hatch cover fell because of its defective condition[5] and in view of the stevedoring contract which provides that the stevedore company shall not be responsible for any loss or damage "resulting from default of ships or other gear supplied by the Government" did the Court of Appeals err in reversing the District Court and holding that the stevedore was liable to the Government?

(5) Even if the so-called "unseaworthiness" can be said to result from "negligent use" of the vessel's unseaworthy equipment by an independent contractor, does not such "unseaworthiness" come within the contract provision relieving the stevedore of liability to the Government for "default of ships or other gear supplied by the Government."

(6) Assuming, as argued by the Government, that the contract does no more than express the existing maritime law, can a stevedore company be impleaded by a shipowner who has been sued for damages by an employee of said stevedore company, in view of the provisions of the Longshoremen's and Harbor Workers' Compensation Act?

---

[5] "We agree with the District Court's finding that both dogs were defective and their pins absent and could not hold erect the heavy hatch cover and that it fell * * * because so insecurely held by the defective dogs." (Wms. R. 319.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

It is respectfully requested that this Court grant a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit involving a federal question of substance not heretofore determined by this Court.

(1) The Court of Appeals has decided in both the *Williams* and *Mitchell* cases that the stevedore employer of the libelants is liable to the Government for decrees entered against the latter by the District Court based upon the Government's sole fault for the happening of the accident. The Government accepted the District Court decrees in favor of libelants but sought to appeal only from the portions of the decrees finding that Arrow was not liable to the Government. The District Court decrees as to libelants became final and the Court of Appeals had no jurisdiction to alter the findings or the decrees with respect to the Government's liability to libelants. Therefore, the basis for the Government's liability to libelants is final and was not subject to review. It is accordingly pertinent to consider the findings and decrees of the District Court. In the *Williams* case the District Court found that the Government was liable because of an unseaworthy and defective hatch cover and that this was the sole proximate cause of the accident. It was found that

> "At the time of said accident the forward dog and its locking pin were defective in that said pin could not be fitted into the holes in said dog and in said bulkhead so as to lock said dog and prevent it from raising"

and also that

> "There was a chain attached to the aft bulkhead for the purpose of holding a locking pin for the aft hook, but the pin therefor was missing and no pin or other means were provided for locking the aft dog." (Wms. R. 39.)

It was also found that the Government

> "failed to use reasonable care in fastening said hatch cover, and failed to fasten it securely and safely so as to prevent its falling." (Wms. R. 42.)

In the *Mitchell* case it was likewise found by the District Court that

> "At the time of said accident said forward dog, which had been holding the cover, became disengaged and thereby released its grip on the cover, and, since the other dog failed to reach far enough to grip the edge of the cover, there was nothing to hold said cover and it fell upon the decedent."

Also that

> "The United States was negligent in failing to remedy said defects and in not taking proper and reasonable precautions to secure said hatch cover so it would not fall."

Also that

> "The said dogs and pin were defective in the particulars heretofore specified and the said vessel was unseaworthy in the said particulars and by reason of the absence of suitable, adequate and proper means and devices for securely locking and fastening said hatch cover so that the same could not fall." (Mchl. R. 28.)

And that

> "The fall of said cover and said fatal injury were proximately caused by said defective and unseaworthy condition of said vessel." (Mchl. R. 28.)

As stated these findings which the Government accepted and upon which it was held liable became final and the Court of Appeals consequently was without power or jurisdiction to disregard. This being so the Court of Appeals erred in holding that

> "The sole proximate cause of the injury to Williams was the negligence of Arrow." (Wms. R. 324),

and that

> "The sole proximate cause of Mitchell's death was the negligence if not recklessness" of Arrow. (Mchl. R. 119.)

(2) The Court of Appeals has made the unprecedented finding that a vessel owner is liable on the theory of "unseaworthiness" where the sole proximate cause of an accident to employees of an independent stevedoring company is the negligence of the stevedore.

It appears from the opinion of the Court of Appeals that the case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90, was erroneously considered as the basis for its opinion that liability can fasten upon a shipowner for injury to a stevedore caused by the sole negligence of the latter's employer. Such a decision, which is without precedent, would, if allowed to

stand, result in far-reaching and ill effects in the shipping industry, and for reasons which are fully argued in the brief in support of this petition we submit most earnestly that this Court should exercise its power to grant certiorari because the point is so substantial and is a Federal question which has never heretofore been determined by this Court.

(3) The Court of Appeals committed obvious error in disregarding the stevedoring contract which absolves Arrow from liability to the Government.

There can be no question but that the stevedoring contract relieves Arrow of all liability in view of the undisputed fact that a defective condition of the hatch cover was a proximate cause of the accident. As heretofore stated, the Court of Appeals in its opinion in the *Williams* case declared as follows: "We agree with the district Court's finding that both dogs were defective and their pins absent and could not hold erect the heavy hatch cover and that it fell on Williams because so insecurely held by the defective dogs." (Wms. R. 319.) The stevedoring contract provides that Arrow shall not be responsible to the Government "for any such loss or damage resulting from default of ships or other gear supplied by the Government."[6]

Counsel for the Government contend, and succeeded in persuading the Court of Appeals to hold, in one part of its opinion (contradicting the above finding),

[6]Article 26, Section (b) (2), as indicated in the Court's opinion. (Wms. R. 325.) See also Appendix, Part I.

that the defective hatch cover was not a proximate cause of the accident but that instead the vessel's "unseaworthiness" was brought about by the negligent use of the hatch cover by the fellow employees of the injured libelants. It was obvious to counsel for the Government that if the defective hatch cover was held to be a proximate cause of the accident, the Government would be liable and Arrow, under the stevedoring contract, would be relieved of all liability. Therefore, counsel chose to argue that the defective hatch cover was not the proximate cause but that the accident was due to so-called unseaworthiness of the vessel arising out of the sole negligence of the fellow servants of the longshoremen who were injured.

But even if we are to assume that this newly devised doctrine of unseaworthiness of the vessel is proper, that contract provision which relieves Arrow of liability for "damage resulting from default of ships or other gear supplied by the Government" nonetheless applies. "Unseaworthiness" is plainly the same thing as a "default" of the ship or its gear. Therefore, the Court of Appeals erred in holding Arrow liable over to the Government in any event.

(4) If, as argued by the Government,[7] the stevedoring contract merely expresses the existing maritime law, Arrow's liability under the Longshoremen's Act, supra, is exclusive and precludes the Government's right to contribution. The section in question concerning exclusiveness of liability (33 USCA 905) reads as follows:

---

[7]See Appendix Part II.

"The liability of an Employer [Arrow] * * * *shall be exclusive and in place of all other liability of such employer* to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *anyone* [the Government] *otherwise entitled to recover damages from such employer* at Law or in admiralty on account of such injury or death * * *." (Emphasis added.)

There are some District Court decisions in which it has been held that notwithstanding the fact that the employer has secured compensation coverage under the Longshoremen's Act, he may still be impleaded and held for contribution by a third party who has been sued by an employee of said employer. Such holdings, we respectfully submit, are erroneous and the only logical ruling should be as laid down by District Judge McColloch in the case of *Leo E. Johnson v. U.S.A.*, 79 Fed. Sup. 448:

"This case raises the question whether a ship sued for an accident to a harbor worker can implead and claim contribution from the harbor worker's employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., that the liability for compensation 'shall be exclusive'."

* * * * * * *

"First, let me say I do not think the Supreme Court's language in the Porello case[8] justifies

---

[8]*American Stevedores Inc. v. Porello et al.*, 330 U.S. 446, 91 L. Ed. 1011.

the claim made for it. The Court was primarily concerned with other questions."

* * * * * * *

"To hold that an employer under a compulsory (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dike. It destroys the basic principle of compensation. As well say the employer can be offered to the injured workman as a co-defendant under Admiralty Rule 56, 28 U.S.C.A. following section 723. The difference is a matter of words only."

A thoughtful consideration of the said section (33 U.S.C.A. 905), together with an appraisal of the background of the Longshoremen's Act, dispels any doubt that an employer's liability "is exclusive and in the place of all other liability of such employer", not only as to his employees or dependents and legal representatives of such employees, but also, as expressly stated, to "*anyone* otherwise entitled to recover damages at law or in admiralty on account of such injury or death." A third party certainly comes within the definition of the term "anyone" as set forth in the quoted statute.

Insofar as we have been able to discover, the first and only time that the United States Court of Appeals was called upon to pass on this precise question was in the case of *Porello v. U.S.A. et al.,* 153 Fed. (2d) 605. The District Court in that case had rendered a decree in favor of an injured stevedore and against the United States, owner of the vessel.

The libelant's employer, who had been impleaded by the Government, was held liable for contribution of one-half. Both respondents appealed. The lower Court and the Court of Appeals were satisfied that the accident was due both to the absence of a locking device on the hatch beam and to the negligent order of the injured man's foreman in causing a vehicle to be raised against the hatch beam in question, thereby upsetting it, with the result that the vehicle and some hatch boards fell and struck the libelant. The work was being done pursuant to a stevedoring contract which differed materially in its wording from the contract in the matter at bar. One of the pertinent provisions was in part as follows:

> "The stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same * * * through the negligence or fault of the stevedores, his employees and servants."[9]

In its original decision, the Court of Appeals held (p. 607) as follows:

> "In our opinion the absence of the lock and DiMare's negligent order operated concurrently in producing the result. Hence both the tort feasors would be jointly and severally liable and each should bear one-half of the libelant's damages, *except for the statutory immunity granted by Section 5, 33 U.S.C.A., Section 905, which makes*

[9]Note there is no limiting provision in the *Porello* case absolving the stevedore where the accident is caused by a "default" of the ship, as in the cases at bar.

the compensation liability exclusive with respect to the employer.

"For a right of contribution to accrue between tort feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution § 86; 13 Am. Jur., Contribution § 51. *Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay.* See *Consolidated Coach Corp. v. Burge,* 245 Ky. 631, 54 S.W. (2d) 16, 85 A.L.R. 1086; *Walker v. Kroger Grocery & Baking Co.,* 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680." (Emphasis added.)

On petition for rehearing the Court of Appeals held that it was not necessary to pass on the question of whether the employer's liability under the Longshoremen's Act was exclusive under the circumstances inasmuch as it felt that the stevedore company was obligated under the contract to indemnify the United States.[10]

However, it seems clear that but for the indemnifying contract, the Court of Appeals in the *Porello* case would have held the Longshoremen's Act to be exclusive of the employer's liability not only to his own employees but as to "anyone otherwise entitled to

[10]On appeal the United States Supreme Court in *American Stevedores, Inc. v. Porello et al.,* 330 U.S. 446, 91 L. Ed. 1011, affirmed the decree of the Circuit Court as to Porello, but reversed the decree awarding full indemnity to the United States under the stevedoring contract and remanded the case to the District Court for determination of the meaning of the contract.

recover damages at law or in admiralty on account of such injury or death." The words "anyone otherwise entitled to recover" must surely include a shipowner who impleads the injured man's employer. The word "damages" is defined by practically all authorities to mean all loss or harm suffered by anyone through the wrongful act of another as defined in 15 *American Jurisprudence* at page 387, as follows:

> "Damages are the pecuniary consequences which the law imposes for the breach of some duty or the violation of some right * * * In statutes or other legal instruments giving compensation for 'damages', the word always refers to some actionable wrongful loss, injury, or harm which results from the unlawful act, omission, or negligence of another."

The stevedoring companies in the various ports of this country under present practices are now subject to the harassment of being impleaded under Admiralty Rule 56, a practice which has grown up in recent years in actions of this category. In practically every case where a longshoreman or harbor worker has brought a libel against the vessel based upon some alleged negligence or unseaworthy condition of the ship, his employer has been impleaded, and in effect, forced to defend against a suit for damages, even though he has complied with the provisions of the Longshoremen's Act. To allow the continuance of this method of joining employers in actions brought by their employees will be to nullify the clear intent of Congress, with the result that longshore-

men and harbor workers will be extended the additional and unintended remedy of recovering damages from their employers. If this unauthorized practice of impleading stevedoring companies is permitted to continue, there can be only one result: The stevedoring companies will be helpless to prevent what actually amounts to law suits against them by their employees in contravention of the Longshoremen's and Harbor Workers' Compensation Act. The smaller companies will undoubtedly be unable to survive in the face of high liability insurance premiums which they will be required to pay for protection against a liability which the Longshoremen's Act has expressly eliminated.

It is revealing to note the remarks of Congressman Graham, who spoke on the floor of the House of Representatives in favor of the adoption of the Longshoremen's Act. He said:

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that." (Congressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, P. 5411.)

This clearly indicates that Congress did not intend that the Longshoremen's Act would be "oppressive to the employer" or a "destructive burden on industry."

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
October 28, 1949.

Respectfully submitted,
LYMAN HENRY,
Attorney for Petitioner.

JOHN H. BLACK,
EDWARD R. KAY,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

ARROW STEVEDORING COMPANY, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No.
ARROW STEVEDORING COMPANY, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	No.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the
Ninth Circuit.

OPINIONS OF THE COURT BELOW.

The opinion of the Court of Appeals in the Williams case, *United States of America v. Arrow Stevedoring Company,* is reported in 175 F. (2d) 329, and is included in the printed record (Wms. R. 317). The

Court of Appeals in the Mitchell case, *United States of America v. Arrow Stevedoring Company,* is reported in 175 F. (2d) 333, and is included in the printed record (Mchl. R. 115).

No opinion was rendered by the District Court in either case but its findings of fact and conclusions of law and decrees are printed in the record. (Wms. R. 36; Mchl. R. 23.)

SPECIFICATION OF ERRORS.

The United States Court of Appeals for the Ninth Circuit erred in the Williams case in making the following rulings:

(1) That the Government is liable (and under the contract entitled to indemnity from Arrow) for unseaworthiness of the vessel "even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover but, as the government claims, its conscious *use* with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams" (an employee of the stevedore). (Wms. R. 318-319.)

(2) That "though the unseaworthy condition arising from the negligent use of the hatch cover was not caused by the government's fault, it is nevertheless liable." (Wms. R. 319.)

(3) That "the sole proximate cause of the injury to Williams was the negligence of Arrow" and that

"the government in no way participated in the wrongful use of the door" (Wms. R. 324), even though "both dogs were defective and their pins absent and could not hold erect the heavy hatch door and that it fell on Williams because so insecurely held by the defective dogs." (Wms. R. 319.)

(4) In reversing the District Court and directing it "to enter a Decree in favor of the government for the amount of its liability to Williams" (Wms. R. 326) in view of the provision of the contract (Appendix Part I) relieving Arrow of all liability for damages "resulting from default of ships or other gear supplied by the Government."

(5) That "with no participation of the government in the wrong done Williams by Arrow, Arrow's agreement to assume liability can have but one interpretation and that favorable to the government." (Wms. R. 325.)

(6) That "Arrow has contracted to be liable to the government for the latter's liability arising (here, solely), from the former's negligence." (Wms. R. 326.)

(7) That the Act[1] should be construed "as limited to liability of the employer to those entitled to damages from the injury to or death of the employee, without any contract relationship to the employer other than the employment." (Wms. R. 326.)

---

[1]Longshoremen's and Harbor Workers' Compensation Act, 33 USCA 901-950.

The United States Court of Appeals erred in the Mitchell case in making the following rulings:

(1) That "Arrow's conduct is recklessness rather than ordinary negligence and, *a fortiori*, Arrow is responsible to the government under the principles controlling in the Williams case, No. 11519." (Mchl. R. 119.)

(2) That "no negligence can be imputed to the ship for the death of Mitchell." (Mchl. R. 119.)

(3) That "the sole proximate cause of Mitchell's death was the negligence if not recklessness of Arrow's working of the men in the known dangerous condition there existing." (Mchl. R. 119.)

(4) That "other contentions raised by Arrow are the same as in case No. 11519 and are disposed of adversely to it for the reasons stated in the opinion in that case." (Mchl. R. 120.)

(5) In reversing the District Court and directing it "to enter a decree in favor of the government for the amount of its liability to Mitchell" (Mchl. R. 120) in view of the provisions of the contract (Appendix Part I) relieving Arrow of all liability for damages "resulting from default of ships or other gear supplied by the Government."

BASIS OF THE COURT'S JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are as set forth under this heading in the attached petition for writ of certiorari.

STATEMENT OF THE CASE.

Reference is made to the attached petition for writ of certiorari for summary statement of the material involved in the consideration of the questions presented.

ARGUMENT.

I.

THE GOVERNMENT'S RIGHT TO RECOUPMENT MUST BE BASED SOLELY UPON THE DISTRICT COURT'S FINDINGS AND DECREE (IN FAVOR OF THE LONGSHOREMEN) WHICH BECAME FINAL, NO APPEAL HAVING BEEN TAKEN.

As the United States Court of Appeals has seen fit to try these cases *de novo* and to make new and different findings of fact contrary to its oft repeated rule against doing so (see the authorities listed by Judge Fee in his dissenting opinion[2] in the case of *Menefee*

---

[2]*Matson Navigation Co. v. Hansen* (9 Cir.), 1943 A.M.C. 86, 132 F. (2d) 487; *Stockton Sand and Crushed Rock Co. v. Bundesen* (9 Cir.), 1945 A.M.C. 659, 148 F. (2d) 159; *Luckenbach Steamship Co. v. Societe Anonima* (9 Cir.), 1942 A.M.C. 666, 127 F. (2d) 86; *Puratich v. U. S.* (9 Cir.), 1942 A.M.C. 611, 126 F. (2d) 914; *Crowley Launch and Tugboat Co. v. Wilmington Transportation Co.* (9 Cir.), 1941 A.M.C. 449, 117 F. (2d) 651; *The Heranger* (9 Cir.), 1939 A.M.C. 369, 101 F. (2d) 953; *Calanchini v. Bliss* (9 Cir.), 1937 A.M.C. 203, 88 F. (2d) 82; *The Shangho* (9 Cir.), 1937 A.M.C. 425, 88 F. (2d) 42; *Lillig v. Union Sulphur Co.* (9 Cir.), 1937 A.M.C. 59, 87 F. (2d) 277; *The Golden Star* (9 Cir.), 1936 A.M.C. 692, 82 F. (2d) 687; *Andrea F. Luckenbach* (9 Cir.), 1935 A.M.C. 1182, 78 F. (2d) 827, 828; *Lortie v. American Hawaiian Steamship Co.* (9 Cir.), 1935 A.M.C. 1178, 78 F. (2d) 819, 820; *Wandtke v. Anderson* (9 Cir.), 1935 A.M.C. 130, 74 F. (2d) 381, 384; *The Bergen* (9 Cir.), 1933 A.M.C. 877, 64 F. (2d) 877, 880; *The Mabel* (9 Cir.), 1932 A.M.C. 1618, 61 F. (2d) 537, 540; *The Hermosa* (9 Cir.), 1932 A.M.C. 541, 57 F. (2d) 20, 24; *Panama Mail Steamship Co. v. Vargas* (9 Cir.), 1929 A.M.C. 1345, 33 F. (2d) 894; *The Boston Maru* (9 Cir.), 1927 A.M.C. 1282, 20 F. (2d) 508, 509; *Luckenbach Steamship Co. v. Campbell* (9 Cir.), 1925 A.M.C. 1551, 8 F. (2d) 223, 224.

v. Chamberlin (C. A. 9), 1949 AMC 1388, 1393), a new point is raised which was not previously presented.

The Government cannot be solely at fault for the accident as to one party litigant, and wholly without fault for the same accident on the same facts as to another party litigant, in the same cause of libel.

The Government was under no particular requirement or duty to implead Arrow in the original cause of libel but could, in the event of its being held liable, have elected to proceed independently against Arrow in a later recoupment or hold-over action. Had this course been followed, the basis for the Government's recoupment would of necessity be the findings of fact and conclusions of law in the cause of libel against the United States by the libelants. Such a recoupment attempt unquestionably would have failed because the Government would have been bound by the District Court's findings of fact and conclusions of law and decree which found the Government to be solely at fault. Admiralty Rule 56 does not enlarge on any of the Government's rights of recoupment. The rule merely provides a simple method for the avoiding of a multiplicity of suits. It permits a single forum for one adjudication as to all of the parties involved and in no way changes or enlarges the substantive law.

As the record now stands, the Government cannot seek or claim recoupment on any basis other than that pursuant to which its liability to the injured was originally established, and that finding and determination,

because of the Government's failure to take an appeal, became final and *res adjudicata,* and the United States Court of Appeals was therefore without jurisdiction to disregard or amend the findings of fact and conclusions of law which establish the Government's primary responsibility. The basis of recoupment to which the Government is limited is therefore one involving its sole fault. On the present record, the liability for which the Government is seeking to recoup from Arrow is the wrong which the Government committed as the result of its sole fault. The United States Court of Appeals, by the contrary conclusions thus presented, has left the parties to this single action in the following position:

(a) *As to the injured longshoremen:* The Government is solely to blame for the accident, and Arrow is entirely free from fault.

(b) *As to Arrow:* The Government, on the same facts and the identical record is nowise to blame for the same accident, and the sole fault is Arrow's.

Thus, we have two opposed and completely antagonistic results in the same cause of libel involving the same parties and the same facts. In short, as to the prevailing libelants the Government has been held solely at fault as a matter of final record, which conclusion, as stated, cannot be disturbed by the United States Court of Appeals since it is without jurisdiction to review it. As to Arrow, the Government has been held blameless and Arrow fully at fault. This preposterous situation is brought about not through

any act of Arrow but by the deliberate act of the Government in not perfecting an appeal or complaining of the trial Court's findings of fact and conclusions of law holding it fully at fault. By this failure to complain or object to the charging allegations of the libelants and findings of fact and conclusions of law thereon, the Government has permitted them to become final and consequently has consented and agreed thereto. The Government's agreement is now irrevocable, and it is estopped to attack the District Court's findings and decree, and it can only seek recoupment from Arrow on the basis for which it was originally held liable, viz., its sole fault.

II.

A VESSEL OWNER CANNOT BE SADDLED WITH LIABILITY FOR INJURY TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR WHERE THE SOLE PROXIMATE CAUSE OF THE INJURY WAS THE NEGLIGENCE OF THE INDEPENDENT CONTRACTOR.

The United States Court of Appeals has committed grave error in holding that the Government, as the vessel owner, was in any respect liable to the injured men for the consequences of the accident, in view of the Court of Appeals' own *de novo* findings that the "sole proximate cause" of the occurrence was the "negligence" of Arrow.

We respectfully submit that Government counsel woefully mislead the Court of Appeals by their faulty interpretation of this Court's decision in the case of

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099, and by their misapplication of the principles involved in the case of *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.,* 32 Fed. (2d) 886 (Cir. 9).

It is true that in the *Sieracki* case this Court did observe that unseaworthiness "is essentially a species of liability without fault" and that "it is a form of absolute duty owing to all within the range of its humanitarian policy." Sieracki's injuries occurred while he was employed as a winchdriver for an independent stevedoring company aboard a vessel owned and operated by Seas Shipping Co. The accident occurred when a shackle supporting a boom broke causing the boom and tackle to fall. Sieracki sued Seas Shipping Co. and two companies which had built the vessel. This Court held that the remedy for injuries proximately caused by unseaworthiness, which has always been available to members of a crew of a vessel, was also available to a longshoreman employed by a third party as in Sieracki's case.

But here is the vital difference between the facts involved in the *Sieracki* case and those in the cases at bar: Sieracki's injuries were *solely and proximately* caused by the vessel's *unseaworthiness,* which unseaworthiness, resulting from a *faulty* shackle, was created by the shipbuilder and not by the employer of the injured longshoreman. The accident in the present proceedings was found by the United States Court of Appeals to have been *solely and proximately caused by the negligence of Arrow,* the employer of

the men injured, and any so-called "unseaworthiness", as suggested in the opinion of the Court of Appeals was immediately and directly created by the longshoremen, fellow servants of the injured. We submit that in the latter circumstances the Government cannot be held liable to the injured longshoremen and that the *Sieracki* case does not support such holding. That case decides that the vessel owner is liable for injuries proximately caused by a default of the vessel, even though the owner may not have created such condition. In the matters at bar the United States Court of Appeals holds that *"the sole proximate cause of the accident was the negligence of Arrow," the employer of the injured men* (not by any defect of the ship). The Government, as vessel owner, could therefore not be liable upon any conceivable legal basis, because the accident, according to that Court's findings, was not caused by any negligence on the part of the Government or any defective or faulty condition of its vessel. The Court of Appeals held the accident was caused solely by the negligence of the longshoremen.

In addition to the foregoing, the *Sieracki* case is not in point for another important reason in that this Court qualified its opinion to exclude therefrom this exact type of case. At page 95 the Court states:

> "The latter stevedore employer ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary

> duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious *or his own action creates them.*" (Emphasis supplied.)

The United States Court of Appeals found, as we have pointed out, that the "perils" involved were the sole proximate cause of Arrow's negligence, thusly bringing them clearly within the foregoing exception of "cause" created by its (Arrow's) "own action".

In the cases at bar the Court of Appeals (reversing the District Court) holds that "the defect of the hatch cover" was not a proximate cause of the accident. In admiralty it is fundamental that a vessel owner is not liable for injuries to an employee of a third party in the absence of a showing that unseaworthiness of the vessel resulting from a faulty condition *proximately caused* such injuries. See *Desiano v. United States of America,* 1946 A.M.C., 544, and *Shelton et al. v. Seas Shipping Company,* 75 Fed. Supp. 195, 1947 A.M.C. 1528, where the injured longshoremen failed in suits against the respective vessel owners because of lack of proof that their injuries were proximately caused by alleged unseaworthiness.

As stated in Robinson on Admiralty, on page 305:

> "That the ship merely is unseaworthy does not avail the seaman, however. The injury must be due to unseaworthiness in respect to the thing from which injury results."

We know of no existing precedent for the remarkable fiction, which was urged by the Government and

adopted by the United States Court of Appeals, that "negligent *use*" of a vessel's appliance by an independent contractor results in "unseaworthiness" of the ship for which the owner can be held liable in the event of injuries sustained by employees of the said independent contractor whose negligence is found to be the sole proximate cause of the accident. Taking all of the authorities from *The Osceola,* 189 U.S. 159, 23 S. Ct. 487, 47 L. Ed. 760, down to the aforementioned case of *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, we do not find a single decision which supports or even suggests this ill-advised and erroneous contention.

Indeed, the Court of Appeals for the Ninth Circuit has taken a contrary position to its holding in *Ove Tysko v. Royal Mail Steam Packet Co.,* 81 Fed. (2d) 960, where an employee of a stevedoring company sustained injuries as the result of falling into the hold because "the plug immediately beneath the ladder had been removed and was covered with dunnage." One of the longshoremen had complained to the mate of the ship who said "the plug could not be put in the hole because sailors were working in the hold below." The foreman of the stevedores testified that he did not see "any necessity of putting in that plug" and that "we all knew about it." The Court of Appeals for the Ninth Circuit held, at page 962: "In 45 C. J. 877, it is said: 'The general rule is that, where proper notice or warning is given, defendant is relieved from liability for injuries received by those who do not heed it, unless disregard thereof is invited, or ac-

quiesced in, by defendant. * * *' Because appellant had actual notice of the danger, appellee was not required to give notice or warning. 45 C. J. 876. Since appellant had notice of the danger, appellee is relieved from liability."

Circuit Judge Mathews in a concurring opinion at page 963 further declared that under the general rules of the Maritime Law "the owner of a ship which is being loaded by a stevedoring company, under contract, is not liable for injuries to an employee of the stevedoring company who, while assisting other employees in loading the ship, steps or falls into an open hatch, the location and condition of which he has observed and is fully aware of. *The Kongosan Maru* (C.C.A. 9) 292 F. 801, 803; *Seas Shipping Co. v. Ward* (C.C.A. 9) 22 F. (2d) 251, 252. The evidence shows, without conflict or dispute, that appellant's injuries were so received."

In the cases at bar, the Court of Appeals has found that the stevedores knew of the condition which caused the accident and that their working under such conditions was dangerous, reckless and negligent, and that this negligence of the stevedores was the sole proximate cause of the accident.

If the United States Court of Appeals' holding in the present cases were to remain in effect, it is inconceivable that there would ever be a situation where longshoremen, injured through their own negligent use of the vessel's equipment, would not be able to collect damages from the vessel.

To illustrate, as a common example, assume that a stevedoring firm is employed by the vessel to discharge cargo. The shipowner turns over its vessel and her appliances to the stevedore. One of the longshoremen in operating the vessel's winch allows excessive slack to accumulate which catches underneath a sling load as it is being hoisted out of the hatch causing the load to be precipitated into the vessel's hold, with the result that a fellow employee is injured. There can be no question that such negligent operation of the winch by the longshoreman winchdriver created an "unsafe place to work" for his fellow employees, and it is likewise clear that this manner of doing the work was a dangerous and reckless practice and that the sole proximate cause of the accident would be the winchdriver's "negligent *use*" of the ship's appliances. Can it be rationally contended that the vessel was thereby made "unseaworthy" and that the injured longshoreman could therefore recover against the vessel in an action based solely upon the negligence of his fellow employee.

Taking another example, which not infrequently occurs, assume that the longshoremen in discharging cargo from the hatch fail to remove a sufficient number of hatch boards or sections of the hatch to permit the work to be done with a reasonable degree of safety, and that as the sole proximate result of their own carelessness and recklessness the load comes into contact with and dislodges some of the hatch boards which are precipitated into the hold, striking and in-

juring some of their fellow longshoremen. Under these facts a trial court would be compelled to find in favor of the injured longshoremen *against the vessel* even though the vessel owner had no knowledge of, nor any participation, in the longshoremen's actions.

Many such examples could be enumerated and in every instance the same absurd result would obtain. In every such case the vessel owner would be required to respond for damages solely and proximately caused by the negligence of the longshoremen.

At the risk of being thought repetitious and only because the point is one of such great importance to the shipping industry as a whole, we are under compulsion to point out that in practical use and application, if ship's gear is properly handled and used by the longshoremen accidents rarely occur. When the gear is mishandled or misused by the longshoremen, injuries to fellow employees result, and it therefore follows, under the pronouncement of the United States Court of Appeals, that for every injury suffered as a result of the improper *use* by longshoremen of vessel's equipment or gear, no matter how good and seaworthy it may be when turned over to them, recovery of damages can be had against the vessel. There will be no exceptions to this startling rule.

The case of *Gonzales v. SS Belos,* 1939 A.M.C. 324, involves facts similar to those in the cases at bar. The libelant, an employee of Jarka Corporation, an independent stevedoring company, sued the ship for injuries suffered while cargo was being discharged from

the hold of the steamship "Belos". The Court held as follows:

> "I have considered the merits and believe that counsel for claimant-respondent is correct in his contention that the ship would not be liable, for the reason that if libellant was injured by negligence, it was the negligence of the foreman and coworkers of libellant that brought about the accident and was the proximate cause thereof. *Aden Maru,* 51 F. (2d) 599; *Daisy,* 282 Fed. 261-262.
>
> "Libellant was injured by certain bales of wood pulp, which he and a number of other co-workers were engaged in discharging from the hold of the ship, falling upon him. The foreman of the stevedores knew of this condition which developed as the bales were being moved, and there is also evidence that he gave instructions which were intended to remedy the condition. Apparently these instructions were not carried out."

It is quite evident from the foregoing facts in the *Belos* case, that an unsafe place to work was created by the longshoremen themselves. (Under the United States Court of Appeals' decision an "unseaworthy" condition was thus created.) But this, quite correctly, was not held to be "unseaworthiness" of the vessel for which the vessel owner could be held liable.

In the *Aden Maru* case, 51 F. (2d) 599, an injured longshoreman, employed by an independent stevedoring company, sought to hold the vessel liable for injuries sustained on the theory that the vessel's winch

was defective and that "the ship failed and refused to furnish bolts for the beam" of the hatch in question. The Court held:

> "In a case of this kind, where the employer (stevedoring company) was unquestionably negligent in the way the work was performed, and where, nearly a year after the injury occurred, for the first time, claim is made that the ship caused the injury, libelants should be prepared, not merely to suggest that the ship may have been negligent, and that its negligence may have been the proximate cause of the injury, but to clearly and satisfactorily establish that it was negligent, and that that negligence was a proximate cause.
>
> "* * * assuming without deciding that the ship failed and refused to furnish bolts for the beam it is entirely plain that everyone, including Culver, knew that the beam was not bolted; and assuming in the same way that in the particulars of leaking steam and the absence of a brake the winch was defective, and that the failure to have the winch in better condition was negligence, it is entirely clear *that neither the absence of bolts, nor the condition of the winch, was the proximate cause of the injury. This occurred solely and entirely as the proximate result of the generally reckless manner in which a dangerous piece of work was being performed* by attempting to drag the bale up across the beam knowing that it was bound to foul it unless some one pushed it off, instead of topping the boom for a complete clearance." (Emphasis added.)

After carefully considering the above facts the court then held as follows:

"Reduced to its simplest terms, this is a case in which a serious injury has resulted on shipboard to an employee of an independently contracting stevedore in the course of a culpably negligent and dangerous method of performing work voluntarily adopted by the employer and voluntarily participated in by the employee.

"In such a case, in order to hold the ship, it must be clearly established, both that it was negligent, and that its negligence was a proximate cause of the injury. In such a case, where the evidence leaves the matter of proximate cause in doubt, it defeats the cause of action. *Reading Co. v. Boyer* (C.C.A.) 6 F. (2d) 185; *Luckenbach v. Buzynski* (C.C.A.) 19 F. (2d) 871. *Where, as here, proximate cause is clearly shown to be the negligence, not of the ship, but of the employer, it is plainer still that the case against the ship must fail. Johns-Manville v. Pocker* (C.C.A.) 26 F. (2d) 204." (Emphasis added.)

Here again is a clear example of injury having been sustained by a longshoreman as the direct and proximate result of the negligence of his employer. The court did not stretch the term "unseaworthiness" to fit a situation where the stevedore company's act of negligence created the unsafe place to work which proximately caused injury to one of its employees.

We shall now distinguish *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.*, 32 Fed. (2d) 886 (Cir. 9). The factual situation in that case is entirely unlike that in the cases at bar, and the court's decision is not at all applicable. There the unseaworthy condition

which proximately caused the accident was created, not by the employer of the injured longshoreman, but by the Seaboard Stevedoring Corp. which had loaded the vessel in another port. Its employees had not properly replaced the vessel's hatch covers. The injured man was employed by another stevedoring company in a later port of call, and in the course of his employment suffered injuries because of the improperly placed hatch boards. He sued the vessel and, upon submission of proof that the injuries were proximately caused by the unseaworthy condition resulting from the improperly placed hatch boards, he recovered. The vessel owner then sued Seaboard Stevedoring Corp. and obtained recoupment of the amount of the judgment, upon proving that the vessel's unseaworthiness was caused by Seaboard. Recovery against the SS "Sagadahoc" by the injured employee of the second stevedoring company was, of course, properly allowed because the unseaworthy condition of the vessel was shown to be the *proximate cause* of his injuries. Such is not the case here where the Government contends, and the Court of Appeals finds, that the *sole proximate cause* of this accident was the negligence of Arrow, the employer of the men injured.

A case strongly relied upon by the Government is *Portel v. United States of America* and *Zalud Marine Corporation,* 1949 A.M.C. 487. An injured ship repair worker was allowed a recovery against the United States (the vessel owner) because he was able to prove that one of the proximate causes of his injury was the failure of the ship's crew to open drains in the

steam lines or to inform employees of the ship repair company as to whether or not the steam lines had been drained although they knew that the ship repair men were to perform work on the valves of the steam lines. The other, and concurring proximate, cause was held to be the negligence of the foreman of the ship repair company in ordering the libelant to work without making any inquiries as to whether steam pressure was in the lines. Consequently, the Court held that libelant was entitled to recover from respondent United States, and that while libelant could not recover directly against his employer, the impleaded respondent (the ship repair company), the Government was entitled to partial recoupment from the impleaded respondent because of the negligence of its foreman as aforesaid.

Unlike the cases at bar, the factual situation in the *Portel* case involves the direct and proximate negligence of the ship's crew. Here the Court of Appeals specifically finds that there was no negligence on the part of the vessel and that the defective hatch cover was not a proximate cause of the accident.

In order to permit recovery-over against the impleaded respondent (Arrow), it must first be established that there is a direct liability on the part of the shipowner (the Government) to the injured stevedore. If, as we have here shown, no legal liability exists as between the libelants and the Government, the question of any right the Government might have had under admiralty principles to contribution from Arrow, is moot. This brings us to a consideration of

the only possible basis of liability on the part of Arrow under the facts of these cases as found by the United States Court of Appeals: the question of its contractual liability to the Government, which we shall next discuss.

III.

THE STEVEDORING CONTRACT RELIEVES ARROW OF LIABILITY TO THE GOVERNMENT WHETHER ARROW'S NEGLIGENCE AND THE VESSEL'S UNSEAWORTHINESS WERE BOTH PROXIMATE CAUSES OF THE ACCIDENT, OR WHETHER ARROW'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The position taken by Government counsel has placed them in a dilemma from which they cannot escape. We respectfully submit that a choice must be made between one of two positions—the two are inconsistent:

(1) The accident was solely and proximately caused by the negligence of Arrow, or

(2) The defective hatch cover, and consequently the vessel's unseaworthiness, was a proximate cause of the accident.

In neither case is Arrow liable. We have heretofore pointed out why a vessel owner can not be held liable for injury to an employee of an independent contractor where the sole proximate cause of the injury is the negligence of the contractor.

If the Government is not liable to the injured stevedores, it has nothing to recoup from Arrow

under the contract or otherwise, and therefore the contract in this respect is meaningless. If the Government is not required to pay anything, there is nothing to recoup. Arrow's liability is clearly governed and limited by the provisions of the Longshoremen's Act, supra, and consequently Arrow cannot be called upon to pay its injured employees anything other than compensation benefits as provided by the Longshoremen's Act.

As to the second alternative, the contract clearly expresses the intention of the parties. Section (b) of the contract[3] provides that Arrow shall be liable to the Government for any "loss or damage" sustained by the Government as a result of Arrow's negligence. This section, however, contains a manifest intention that it is to be *limited* in its application since it concludes as follows:

> "* * * subject, however, to the following *limitations* and conditions:" (Emphasis supplied.)

The pertinent limiting language is contained in Subsection (2) as follows:

> "* * * Nor shall the contractor (Arrow) be so responsible for any *such* loss or damage resulting from default of ships or other gear supplied by the Government."

We have emphasized the word "such" because we believe it demonstrates the obviousness and clear appli-

[3]See Appendix Part I for pertinent portions of the stevedoring contract.

cation of the limitation. The only possible significance to be attached to the words "such loss or damage" is that reference is thereby patently made directly to the words "any loss or damage", which are contained in Section (b). It is therefore crystal clear that under the contract Arrow is not liable to the Government for "any loss or damage which may be sustained by the Government as a result of the negligence" of Arrow, in the event that "any such loss or damage" results from a "default" of the ship or its gear.

We reiterate that it cannot be properly held that mere negligent *use* by Arrow's employees of the appliances of the vessel produced "unseaworthiness", thereby making the Government liable to the employees of Arrow who become injured as the sole, direct and proximate result of such negligent use. If the accident was caused by any unseaworthiness of the vessel, it was the unseaworthy condition caused by the defective hatch door. The United States Court of Appeals, however, by a process of incredible reasoning has exonerated this defect as a proximate cause of the accident. We earnestly insist that a nice distinction cannot be made between unseaworthiness caused by a defective hatch cover and unseaworthiness resulting from an unsafe place to work as the result of Arrow's negligent use of said hatch cover. If there was any unseaworthiness, it had to stem from the defective hatch door, and in that case the limiting provision of the contract, providing that Arrow shall not be "so responsible for any such loss or damage resulting from default of ships or other gear sup-

plied by the Government", is clearly applicable. Accordingly, Arrow cannot be held liable to the Government under the contract, or otherwise.

In the light of the above reasoning it is at once clear why the Government has taken the desperate and precarious position by which, strangely enough, it succeeded in persuading the Court of Appeals to reverse the District Court. It was the only theory open to the Government in its effort to avoid liability under its contract with Arrow. If the defective hatch door is held to be one of the proximate causes of the accident, the limiting provision of the contract undoubtedly relieves Arrow of any liability even though Arrow's negligence in creating for its employees an unsafe place to work, is held to be a joint proximate cause of the accident.

Moreover, if Arrow's negligence is the sole proximate cause of the injuries to its own employees (for which its exclusive liability is under the Longshoremen's Act[4]), the Government cannot be held liable, and consequently there can be no hold-over liability against Arrow.

It is understandable, therefore, why the Government sought to bypass the admittedly unseaworthy hatch door as being a proximate cause of the accident. It can be seen that of necessity, in order to seek recoupment from Arrow, the Government somehow had to eliminate this "default" of the ship or "gear

[4]Longshoremen's and Harbor Workers' Compensation Act, 33 USCA 901-950, particularly section 905.

supplied by the Government." It would be the most tortured kind of logic and reasoning to disregard the proven fact that at least one proximate cause of the accident was the admittedly unseaworthy hatch door. The Government cannot avoid the plain and irrefutable fact that the vessel's hatch door was unseaworthy and constituted a "default" of the vessel and that such default was a proximate cause of the accident. The Court of Appeals in its decision in the Williams case held as follows: "We agree with the district court's finding that both dogs were defective and their pins absent and could not hold erect the heavy hatch cover and that it fell on Williams because so insecurely held by the defective dogs." (Wms. R. 319.)

We therefore respectfully submit that it must be found from the undisputed evidence that the unseaworthy hatch door was a proximate cause of the accident and that under the stevedoring contract Arrow is relieved of all liability.

IV.

EVEN ASSUMING THAT NEGLIGENCE AND IMPROPER USE OF THE VESSEL'S APPLIANCE CONSTITUTES "UNSEAWORTHINESS" OF THE VESSEL, THE STEVEDORING CONTRACT RELIEVES ARROW OF LIABILITY FOR THE ACCIDENT.

The grave error of the Court of Appeals in ignoring or misinterpreting the significant provisions of the stevedoring contract is apparent in another respect.

In adopting the Government's artful contention that the unseaworthiness causing the accident "was not the defect in the hatch cover" but was Arrow's "conscious *use* with knowledge of its defect," the Court of Appeals was nonetheless bound to absolve Arrow of liability under the terms of the stevedoring contract. "Unseaworthiness" and "default of ship" are synonomous.

Nor can the Government avoid the limiting provision of the contract which relieves Arrow of liability "for any such loss or damage resulting" from such "default" or "unseaworthiness". Therefore, despite the attempted play on words involved in the Government's theory and adopted by the Court of Appeals, the evidence definitely shows, and the Court of Appeals itself has found, supra, that the unseaworthiness (default) of the vessel was a proximate cause of the accident. The contract under such conditions plainly relieves Arrow of all liability for the injury to Williams and death of Mitchell. As we have heretofore stated, the situation presents a dilemma from which the Government cannot escape under any logical theory.

V.

WHETHER OR NOT THE STEVEDORING CONTRACT MERELY EXPRESSES THE EXISTING MARITIME LAW, AS ARGUED BY THE GOVERNMENT,[5] ARROW'S LIABILITY UNDER THE LONGSHOREMEN'S ACT IS EXCLUSIVE AND PRECLUDES THE GOVERNMENT'S RIGHT TO CONTRIBUTION.

Arrow, having secured compensation coverage under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950, cannot be held liable-over to the Government. Section 905, under the heading "Exclusiveness of Liability" provides in pertinent part as follows:

> "The liability of an employer [Arrow] * * * *shall be exclusive and in place of all other liability of such employer* to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *anyone* [the Government] *otherwise entitled to recover damages from such employer* at Law or in admiralty on account of such injury or death * * *." (Emphasis added.)

There are some District Court decisions in which it has been held that notwithstanding the fact that the employer has secured compensation coverage under the Longshoremen's Act, he may still be impleaded and held for contribution by a third party who has been sued by an employee of said employer. Such holdings, we respectfully submit, are erroneous and the only logical ruling should be as laid down by District Judge McColloch in the case of *Leo E. Johnson v. U.S.A.*, 79 Fed. Sup. 448:

---

[5]See Appendix, Part II.

"This case raises the question whether a ship sued for an accident to a harbor worker can implead and claim contribution from the harbor worker's employer, in disregard of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., that the liability for compensation 'shall be exclusive'."

* * * * * * *

"First, let me say I do not think the Supreme Court's language in the Porello case[6] justifies the claim made for it. The Court was primarily concerned with other questions."

* * * * * * *

"To hold that an employer under a compulsory (as to him) compensation act can be sued indirectly, as proposed here, is like opening a hole in a dike. It destroys the basic principle of compensation. As well say the employer can be offered to the injured workman as a co-defendant under Admiralty Rule 56, 28 U.S.C.A. following section 723. The difference is a matter of words only."

A careful reading of Section 5 (33 U.S.C.A. 905) of the Longshoremen's Act, together with an appraisal of the background of the law, dispels any doubt that an employer's liability "is exclusive and in the place of all other liability of such employer", not only as to his employees or dependents and legal representatives of such employees, but also, as expressly stated, to "*anyone* otherwise entitled to recover damages at law or in admiralty on account of

[6] *American Stevedores Inc. v. Porello et al.*, 330 U. S. 446, 91 L. Ed. 1011.

such injury or death." A third party certainly comes within the definition of the term "anyone" as set forth in the quoted statute.

Insofar as we have been able to discover, the first and only time that the United States Court of Appeals was called upon to pass on this precise question was in the case of *Porello v. U.S.A. et al.*, 153 Fed. (2d) 605. The District Court in that case had rendered a decree in favor of an injured stevedore and against the United States, owner of the vessel. The libelant's employer, who had been impleaded by the Government, was held liable for contribution of one-half. Both respondents appealed. The lower court and the Court of Appeals were satisfied that the accident was due both to the absence of a locking device on the hatch beam and to the negligent order of the injured man's foreman in causing a vehicle to be raised against the hatch beam in question, thereby upsetting it, with the result that the vehicle and some hatch boards fell and struck the libelant. The work was being done pursuant to a stevedoring contract which differed materially in its wording from the contract in the matter at bar. One of the pertinent provisions was in part as follows:

> "The stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same * * * through the negligence or fault of the stevedores, his employees and servants."[7]

[7]Note there is no limiting provision in the contract in the *Porello* case absolving the stevedore where the accident is caused by a "default" of the ship as in the cases at bar.

In its original decision, the Court of Appeals held (p. 607) as follows:

> "In our opinion the absence of the lock and DiMare's negligent order operated concurrently in producing the result. Hence both the tort feasors would be jointly and severally liable and each should bear one-half of the libelant's damages, *except for the statutory immunity granted by Section 5, 33 U.S.C.A., Section 905, which makes the compensation liability exclusive with respect to the employer.*
>
> "For a right of contribution to accrue between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution § 86; 13 Am. Jur., Contribution § 51. *Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay.* See *Consolidated Coach Corp. v. Burge,* 245 Ky. 631, 54 S.W. 2d 16, 85 A.L.R. 1086; *Walker v. Kroger Grocery & Baking Co.,* 214 Wis. 519, 252 N. W. 721, 92 A.L.R. 680." (Emphasis added.)

On petition for rehearing the Court of Appeals held that the foregoing language was not necessary, to the opinion since, under the terms of the contract, the stevedoring company was obligated to fully indemnify the United States for the loss in question. In this respect the Court stated (p. 609):

> "We are by no means convinced that the rule of *The Chattahoochee,* 173 U.S. 540, 19 S. Ct. 491, 43 L. Ed. 801, which was not previously called

> to our attention, is controlling in a situation such as this, but the point may be considered left open since determination of the right of contribution is not essential to a decision as to indemnity under the respondent's contract."

In other words, it was held that the point raised may be considered left open, since it was unnecessary to the determination of the case, in view of the indemnifying provision of the contract. But the Court was careful to point out that it was "by no means convinced that the rule of *The Chattahoochee* * * * is controlling in a situation such as this."

Thus, it is clear that the only expressed opinion by the United States Court of Appeals on the precise point in question is that the statutory immunity granted by Section 5 (33 U.S.C.A. Section 905) of the Longshoremen's and Harbor Workers' Act, "makes the compensation liability exclusive with respect to the employer" and that in the absence of an indemnifying agreement the employer can not be held liable-over to a third party for injuries suffered by the former's employee.[8]

To allow the continuance of actions of this kind would be to circumvent the clearly expressed intention of the Longshoremen's Act and to make available to longshoremen and harbor workers the never-in-

---

[8]On appeal the United States Supreme Court in *American Stevedores, Inc. v. Porello et al.*, 330 U. S. 446, 91 L. Ed. 1011, affirmed the decree of the Circuit Court as to Porello, but reversed the decree awarding full indemnity to the United States under the stevedoring contract and remanded the case to the District Court for determination of the meaning of the contract.

tended, right, in effect, to sue their employers, in addition to their compensation benefits.

A careful analysis of the purposes of workmen's compensation statutes and a reading of the very section of the Longshoremen's Act dealing with exclusiveness of liability can aught but result in the only conclusion that an employer cannot, under the Act, be subjected to any other liability whether the action be brought by the employee, his legal representative, husband or wife, parents, dependents, next of kin, or whether such action be brought by "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death" (Section 5, of the Longshoremen's Act, 33 U.S.C.A., 905.)

The word "damages" as used in the foregoing section of the Longshoremen's Act is defined by practically all legal authorities to mean compensation for any loss or harm suffered by one through the wrongful act of another. (Here, the Government claims recoupment because of an alleged "wrongful act" or "negligence" of Arrow.) A definition of "damages" is given in 15 American Jurisprudence, page 387, as follows:

> "Damages are the pecuniary consequences which the law imposes for the breach of some duty or the violation of some right * * * In statutes or other legal instruments giving compensation for 'damages', the word always refers to some actionable wrongful loss, injury, or harm which results from the unlawful act, omission, or negligence of another."

See also *Wood v. Security Mut. L. Ins. Co.*, 112 Neb. 66, 198 N.W. 573, 34 A.L.R. 712, quoting Black's Law Dictionary wherein the word "damage" is defined as "loss, injury, or deterioration caused by the negligence, design, or accident of one person to another in respect to the latter's person or property." And, further quoting from Bouvier's Law Dictionary, the term is defined as being "the indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights, through the act or default of another."

The undoubted objective behind the enactment of workmen's compensation statutes was the elimination of the uncertainties, hardships, expense and generally unsatisfactory consequences resulting from law suits, both as to the employee and the employer. There was substituted, instead, a system whereby immediate, adequate and satisfactory indemnity and medical treatment would be provided for an employee injured in the course of his employment *irrespective of fault*. The costs of such system are thusly spread equitably among all industry. The employer, in paying for the upkeep of the system, is in turn relieved of the expense and hazards of damage suits.

To allow a distortion of Section 5 of the Longshoremen's Act (33 U.S.C.A. Section 905), as has resulted from the several district court opinions cited in the Government's briefs in the Court below is to defeat the very purposes, and indeed, the clear-cut language of the statute. It is revealing to note the remarks by Congressman Graham, who spoke on

the floor of the House of Representatives in favor of the adoption of the Longshoremen's Act. He said:

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that." (Congressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, P. 5411.)

The stevedoring companies in the various ports of this country are now subject to the harassment of being impleaded under Admiralty Rule 56, a practice which has grown up in recent years in actions of this category. In practically every case where a longshoreman or harbor worker has brought a libel against the vessel based upon some alleged negligence or unseaworthy condition of the ship, his employer has been impleaded, and in effect, forced to defend against a claim for damages, even though he has complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. To allow the continuance of this method of joining employers in proceedings of this nature will be to nullify the clear intent of Congress, with the result that longshoremen and harbor workers will be extended the additional and unintended remedy of recovering damages from their employers.

If this unauthorized practice of impleading stevedoring companies is permitted to continue, there can be only one result. The stevedoring companies will be

helpless to prevent what actually amounts to law suits against them by their employees in contravention of the Longshoremen's and Harbor Workers' Compensation Act. The smaller companies will undoubtedly be unable to survive in the face of high liability insurance premiums which they will be required to pay for protection against a liability which the Longshoremen's Act has expressly eliminated.

CONCLUSION.

By reason of the foregoing, we respectfully submit that the records of the proceedings in the District Court fully support that court's decrees dismissing Arrow from all liability in the premises. The Government having accepted the decrees as to libelants, can not seek recovery from Arrow on any basis other than as found in said decrees which are final. Therefore, the decrees of the Court of Appeals directing reversal of the District Court decrees are erroneous and should be set aside since the Court of Appeals had no jurisdiction to alter or reverse the District Court's final decrees in favor of the libelants.

In any event, we respectfully submit that the accident was proximately caused in one of three ways: (a) By the sole negligence of the stevedores themselves, in which event the Government would have no liability to libelants, and neither would Arrow in view of the Longshoremen's Act which precludes recovery against the employer. (b) Solely by the reasons of

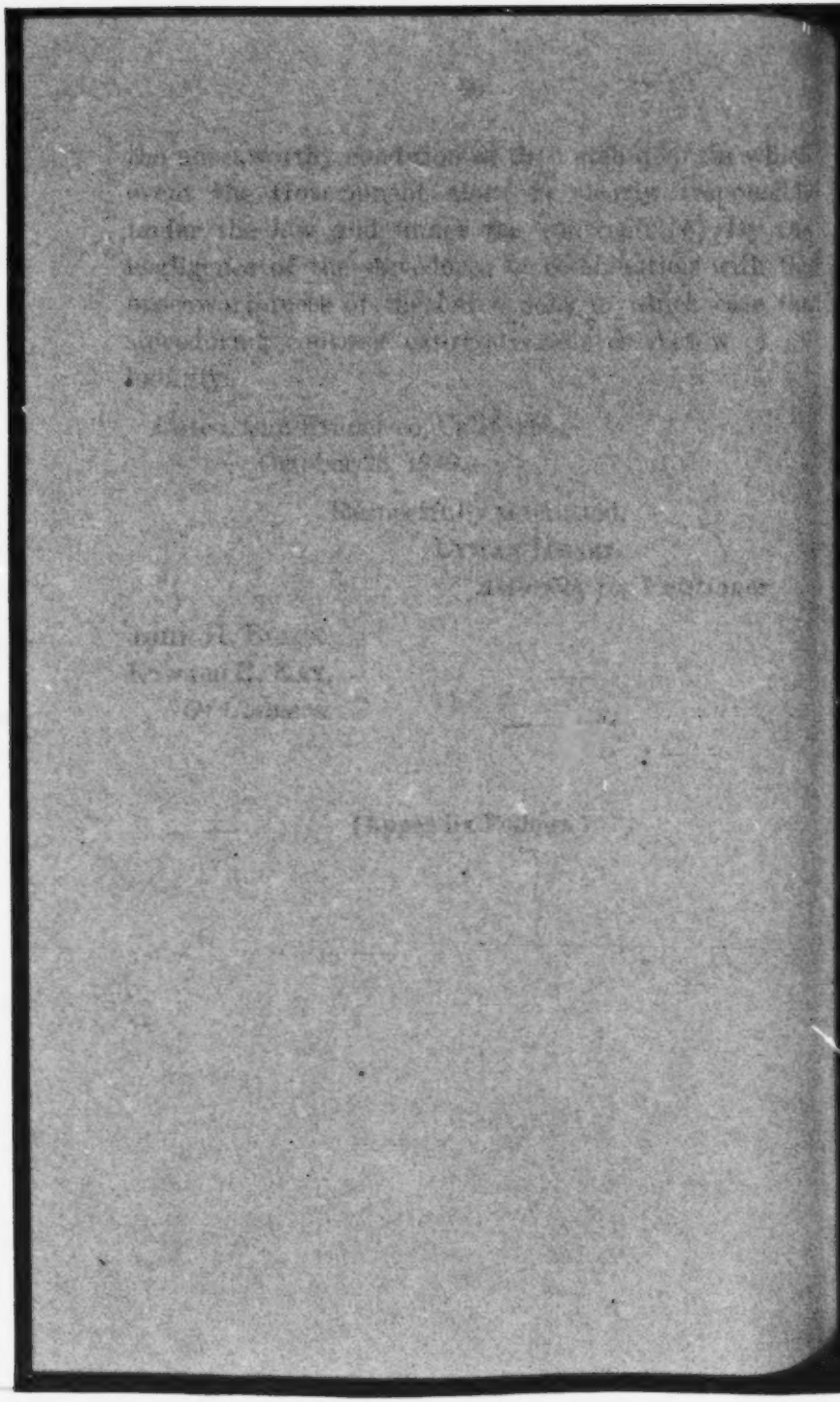
the unseaworthy condition of the hatch door, in which event the Government alone is clearly responsible under the law and under the contract. (c) By the negligence of the stevedores in combination with the unseaworthiness of the hatch door in which case the stevedoring contract expressly relieves Arrow of all liability.

Dated, San Francisco, California,
October 28, 1949.

Respectfully submitted,
LYMAN HENRY,
Attorney for Petitioner.

JOHN H. BLACK,
EDWARD R. KAY,
Of Counsel.

(Appendix Follows.)



Appendix

PART I.

PERTINENT PORTIONS OF STEVEDORING CONTRACT.

Article 26. Liability and Indemnity.

(a) The Contractor shall procure and maintain at all times during the continuance of this agreement a policy or policies of insurance with underwriters to be approved by the contracting officer insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than $250,000.00 in any one accident, and for property damage occasioned to any pier, car, lighter, vessel, cargo or other property to an amount not less than $250,000.00 in any one accident arising out of any operations performed hereunder.

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:

(1) The Contractor's liability to the Government shall be limited to the sum of $250,000.00 for loss or damage in connection with any single catastrophe, accident or occurrence in the event that any such catastrophe, accident or occurrence and such loss or damage shall arise from or be in any way attributable to or connected with the presence or proximity of

ammunition, explosives, gasoline or other inherently dangerous cargoes or the loading, discharging or handling of such cargo by the Contractor.

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government, or resulting from compliance by officers, agents, or employees of the Contractor with specific directions of the Port Director, NTS, Twelfth Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

(c) The services to be performed in pursuance of the provisions of this contract are incident to war activities of the Government and will include services of a nature normally performed by the Contractor in peace time commercial operations with the risks and hazards normally incident thereto and may involve the loading, discharging, handling, presence or proximity of ammunition, explosives, gasoline, and other inherently dangerous cargoes. It is understood that the consideration herein provided to be made to the Contractor for the services to be performed hereunder have been established with regard only to the normal risks and hazards involved in similar services in peace time commercial operations, but that such consideration does not include any allowance for the additional and extraordinary risks and hazards described above. To induce the Contractor to undertake the performance of such services for the consideration herein provided, and thus obtain for the Government the resulting

benefit of such reduced consideration, the Government will hold the Contractor harmless against any loss, expense (including expense of litigation), and liability to third persons because of death, bodily injury, or property damage or destruction or otherwise of any kind whatsoever, irrespective of negligence of Contractor, his officers, agents, servants or employees; subject, however, to the following conditions and limitations:

(1) The undertaking of the Government shall be applicable and limited to situations where such loss, expense or damage arises out of, results from or is in any way attributable to or connected with the presence or proximity of ammunition, explosives, gasoline, or other inherently dangerous cargoes, or the loading, discharging or handling of such cargo by the Contractor.

(2) The undertaking of the Government shall be applicable and limited to situations where the total and entire amount of such loss, expense, or damage pertaining to any single catastrophe, accident, or occurrence, exceeds the sum of $250,000.00 and further, shall be limited to the excess over and above $250,000.00 of the total and entire amount of such loss, expense and damage, pertaining to any single catastrophe, accident or occurrence.

(3) The undertaking of the Government shall not be applicable and the Government shall have no obligations or liability in respect of such undertaking or otherwise, in situations where such loss, expense, or

damage is due to willful and deliberate disregard of instructions of the Port Director, NTS, Twelfth Naval District, or to the personal failure to exercise good faith or that degree of care normally exercised in the performance of Contractor's peace time commercial operations by the elected corporate officers of the Contractor or the representative of the Contractor having supervision and direction of all operations at any pier where the Contractor may perform services hereunder.

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have abainst the United States by reason of any payment under said policy.

PART II.

PORTION OF GOVERNMENT'S BRIEF (COURT OF APPEALS).

The following is taken from page 43 thereof of the Government's brief in the United States Court of Appeals:

Arrow has contended throughout these cases that it is relieved of all liability to the United States by reason of the indemnity clauses of the contract which provide:

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:

* * * * * * *

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships' or other gear supplied by the Government.

We believe, however, that the language of these clauses is plainly not designed to alter the result reached in their absence, but on the contrary, merely restates the rules of the federal maritime law.